Workers' Compensation Appeals Tribunal

COMPENSATION APPEALS FORUM

Tribunal d'appel des accidents du travail

RESEARCH AND PUBLICATIONS DEPARTMENT
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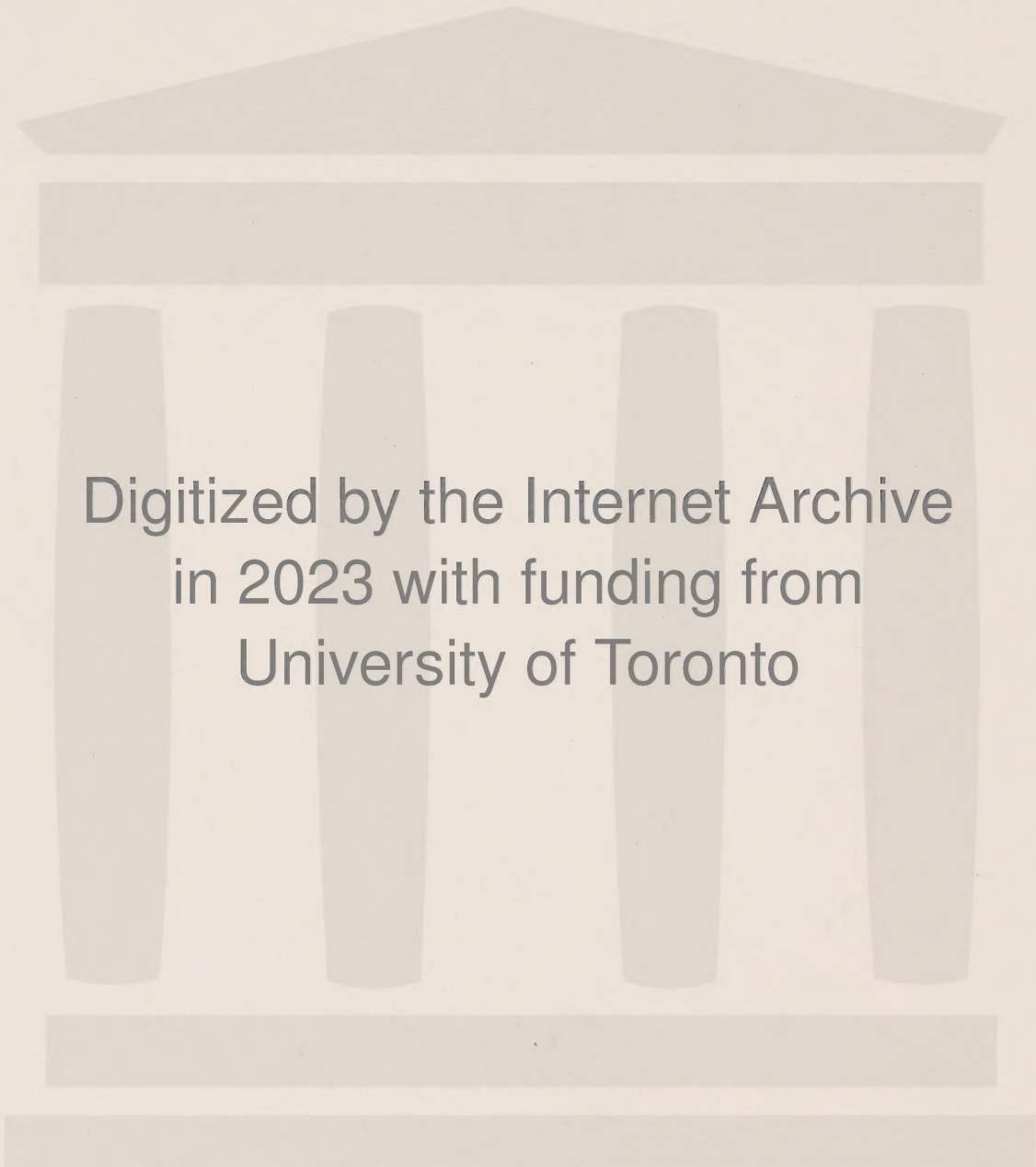

COMPENSATION APPEALS FORUM
Vol. 2, No. 1 (April 1987)

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Compensation Appeals Forum is a publication of the Workers' Compensation Appeals Tribunal and is available free of charge. The views and opinions expressed herein are those of the authors and do not necessarily represent those of the Tribunal. The *Compensation Appeals Forum* invites submissions of papers, case comments, letters, etc., in English or French, discussing Tribunal decisions, processes, or compensation law principles relevant thereto, for consideration for publication. The Editorial Board reserves the right to reject, edit, or condense all submissions and does not assume responsibility for the loss or return of manuscripts. The contents may not be reproduced in any form without written authorization.

From the Editors . . .

Welcome to the second issue of the *Compensation Appeals Forum,* published by the Workers' Compensation Appeals Tribunal of Ontario. The Tribunal, under the chairmanship of S. Ronald Ellis, Q.C., determines appeals arising under the *Workers' Compensation Act* and appeals from decisions of the Workers' Compensation Board of Ontario respecting entitlement to compensation or benefits, and assessments or penalties. It also determines the effect of the Act on workers' rights to take civil actions against their employers. In the *Forum,* we publish analytical comment from our constituencies and other observers concerning the Tribunal's decisions, processes, and general compensation principles related thereto. Our first issue, which appeared in October 1986, featured a short history of the Tribunal, and discussions of the role of Tribunal counsel and of some Tribunal decisions concerning psychogenic pain. In this issue, we are pleased to present six articles ranging from a review of the Tribunal's treatment of the available work issue in *Decision No. 2,* to a more general study of workers' compensation coverage for farm workers.

We invite our readers to submit papers, case comments, letters, and replies to articles appearing in previous issues, etc. for consideration for publication. We are looking for constructive comments about, or an analysis of, Tribunal decisions and processes, or related general compensation issues. It is our hope that comment from one perspective will trigger further comment, so that the *Forum* will be the focal point of a dynamic exchange of views. It is our goal that the *Forum* become a source of ideas and perspectives referred to at Tribunal hearings.

Please send submissions directly to Dr. Roger Rickwood, Chairman of the Editorial Board of the *Forum,* Research and Publications Department, Workers' Compensation Appeals Tribunal, 505 University Avenue, 7th Floor, Toronto, Ontario, M5G 1X4, telephone (416) 598-4638. Submissions will be reviewed by an editorial board established within the Research and Publications Department, and will not be seen by decision-making members of the Tribunal until they are published. The editorial board reserves the right to reject, edit, or condense all submissions, and does not assume the responsibility for the loss or return of manuscripts. Copies of the *Forum* may be obtained from the Research and Publications Department or by completing the order form at the back of this issue.

We look forward to reading your contribution!

FORUM SUR LES APPELS EN MATIÈRE D'ACCIDENTS DU TRAVAIL
Volume 2, numéro 1 (Avril 1987)

TABLE DES MATIÈRES

Forum sur les appels en matière d'accidents du travail est une publication gratuite du Tribunal d'appel des accidents du travail. Les vues et opinions qu'elle contient sont celles des auteurs et ne représentent pas nécessairement celles du Tribunal. La rédaction de *Forum sur les appels en matière d'accidents du travail* examinera, pour fins de publication, tout article, commentaire sur des causes, lettre ou autre texte que voudront bien lui soumettre ses lecteurs, en anglais ou en français, au sujet des décisions et procédés du Tribunal ou des principes juridiques d'indemnisation qui s'y rapportent. Le conseil de rédaction se réserve le droit de rejeter, de mettre au point ou de condenser tous les documents soumis et ne se tient pas responsable de leur perte éventuelle ni de leur retour.

Message de la rédaction

C'est avec plaisir que nous vous présentons le deuxième numéro de *Forum sur les appels en matière d'accidents du travail* du Tribunal d'appel des accidents du travail de l'Ontario. Le Tribunal, sous la présidence de Me S. Ronald Ellis c.r., décide les appels interjetés en vertu de la *Loi sur les accidents du travail* et les appels de décisions rendues par la Commission des accidents du travail de l'Ontario relativement à l'admissabilité à des indemnisations et à des prestations et à l'imposition de cotisations ou à des amendes. Le Tribunal décide aussi les conséquences de la Loi sur le droit des travailleurs d'intenter des poursuites civiles contre leur employeur. Nous publions dans *Forum* des commentaires analytiques de nos constituants et d'autres observateurs sur les décisions et les procédés du Tribunal et sur les principes généraux d'indemnisation s'y rapportant. Le premier numéro, paru en octobre 1986, présentait un court historique du Tribunal, un examen du rôle du conseiller juridique du Tribunal et de quelques décisions du Tribunal relatives à la douleur psychogénique. Dans le présent numéro, il nous fait plaisir de vous présenter six articles traitant de sujets aussi divers que la question du travail disponible dans *la décision nº 2* du Tribunal ou, de façon plus générale, des indemnisations offertes aux travailleurs agricoles.

Nous invitons nos lecteurs à nous soumettre, aux fins de publication, des articles, des commentaires sur des causes, des lettres ou des réponses aux articles parus dans les numéros précédents. Nous recherchons des commentaires constructifs ou des analyses portant sur les décisions et les procédés du Tribunal ou sur les questions générales d'indemnisation qui s'y rapportent. Nous espérons qu'un commentaire en suscitera d'autres de sorte que *Forum* soit le véhicule d'un échange de vues dynamique. Ainsi, *Forum* pourra devenir une source d'idées et de points de vue qui pourront être utiles au cours des audiences du Tribunal.

Veuillez faire parvenir vos écrits directement au Dr Roger Rickwood, président du conseil de rédaction de *Forum*, Service de la recherche et des publications, Tribunal d'appel des accidents du travail, 505, avenue University, 7e étage, Toronto (Ontario) M5G 1X4, téléphone (416) 598-4638. Les articles soumis seront examinés par un conseil de rédaction composé de membres du Service de la recherche et des publication; les membres du jury du Tribunal ne pourront en prendre connaissance avant leur publication. Le conseil de rédaction se réserve le droit de rejeter, de mettre au point ou de condenser tous les articles soumis et ne se tient pas responsable de leur perte éventuelle ni de leur retour. On peut obtenir des exemplaires de *Forum* en s'adressant au Service de la recherche et des publications ou en remplissant la formulaire de commande figurant à la dernière page du présent numéro.

Nous attendons votre contribution avec impatience!

Decision No. 2: Compensation for Temporary Partial Disability

Alec Farquhar*

BACKGROUND

One of the most odious features of the compensation system before 1974 was the Workers' Compensation Board's (the Board) practice of reducing injured workers' benefits during the healing process, when the worker theoretically became capable of doing modified work. It was not unusual for a worker to be cut to 50 per cent benefits or lower, even though the injuries were still healing, and no modified work was available to the worker. Injured worker and labour protests, culminating in a mass sit-in at the Legislature in June, 1974, resulted in amendments creating what are now sections 40(2)(b) and 40(3) of the *Workers' Compensation Act* (except that the 1974 predecessor of s. 40(3) did not mention the Canada Pension Plan). The amendments were supposed to ensure that temporarily partially disabled workers for whom no modified work was available would not have their benefits reduced.

Although the amendments helped many workers, a problem developed in situations where the Board felt that the worker was unjustifiably claiming total disability. In these situations, it became quite common for the Board to reduce benefits when the worker challenged the Board's view that he or she was fit for modified employment. In many of these cases, a more understanding and careful approach by the Board would have revealed that the worker really meant that he or she could not return to the old, heavy job, or perhaps that the worker had a genuine pain syndrome.

DECISION NO. 2

At the core of *Decision No. 2* is the question of whether a mere declaration of "total disability" is enough to allow the Board to reduce s. 40(2)(b) benefits.

In its *Interim Decision*, dated January 27, 1986, the WCAT Panel, chaired by S.R. Ellis, determined that the worker was indeed only partially disabled during the six month period under appeal, even though she had declared herself totally disabled.

The bulk of the *Final Decision No. 2*, dated January 9, 1987, is the Panel's review of the legislative history and meaning of s. 40(2)(b). Section 40(2)(b) guarantees full benefits to the injured worker who does not return to work *unless* the worker

> (i) fails to co-operate in or is not available for a medical or vocational rehabilitation program . . ., or
>
> (ii) fails to accept or is not available for employment which is available . . .

The Panel concluded that, if the worker is being considered under subsection (ii), the "employment" must be work which "is in fact available to that particular worker" (pp. 12-13). Therefore, if the Board was trying to disqualify the worker under subsection (ii), a mere declaration of total disability would *not* disentitle the worker to benefits — because there was no proof of available work.

However, the Panel then went on to state that subsection (ii) was only one of *two* subsections under which the worker could be disentitled. The primary disentitling section, in the Panel's view, is subsection (i), so that the question to be asked was "did the worker (by her claim of total disability) fail to co-operate in or was she not available for a *medical or vocational rehabilitation program* . . .?" (p. 14, my emphasis). The Panel was able to avoid answering this question, because of the finding that the injured worker was a "long-term employee", and thus exempt for up to six months from participating in an active rehabilitation program (p. 16). However, the Panel's comments on subsection (i) are very important.

The Panel saw the Board's approach under subsection (i) as a mechanical one: if the worker declared himself or herself totally disabled, this meant he or she could not do a job search, and thus he or she was unavailable for *any* rehabilitation program. In the Panel's view, there is clear medical evidence that there are *many* partially disabled workers who genuinely believe themselves to be totally disabled, but who in fact respond to rehabilitation programs; and if anything, a claim of total disability "might arguably be the occasion for redoubling" rehabilitation efforts, to avoid a *permanent* chronic pain syndrome (p. 15). The Panel stated that, if it had to address the issue of the correctness of making a job search a precondition for rehabilitation, it would have to look at the Board's discretionary policy-making powers under s. 54, and the words "in the Board's opinion" in s. 40(2)(b)(i). A declaration of total disability would continue to disentitle workers under s. 40(2)(b)(i) unless there was some obligation on the Board to provide "special rehabilitation programs *not* involving immediate job searches" (p. 16, emphasis added).

WHERE DOES DECISION NO. 2 LEAVE US?

Decision No. 2 gives us clear direction in some areas, some ideas for future approaches to s. 40(2)(b)(i), and some concern as well.

Clear Direction

The Tribunal has confirmed that s. 40(2)(b) *guarantees* full benefits to temporarily partially disabled workers who have not returned to work, *unless* the worker *fails* to co-operate. The burden of proof is on the Board or employer to prove non-co-operation. The burden is *not* on the worker to *prove* co-operation (p. 14).

In addition, when the Board is explicitly using s. 40(2)(b)(ii) to reduce benefits, there must be proof that specific work was available to the worker (pp. 12-13). It is also reasonably clear, although not firmly decided, that the Tribunal will uphold the Board's historical policy of cutting workers' benefits under s. 40(3) uniformly to 50 per cent, rather than to some lower percentage such as 25 or 15 per cent or less (pp. 17-18).

As a sidelight, *Decision No. 2* accepts that "long-term service" under the Board's policy applies where a worker has worked as little as three years for the accident employer.

Ideas

The Tribunal has given us some ideas regarding approaches to the key provision, s. 40(2)(b)(i), where the worker has declared total disability. It can be argued that a claim of total disability does *not* necessarily mean that the worker is refusing to co-operate with rehabilitation. It could also be argued that the Board has a duty to offer such workers a program to deal with the pain, or counselling to ascertain whether the worker is really declaring total disability. If a worker can show that it is wrong for the Board to make job search a precondition for his or her rehabilitation, it would set the stage for a Tribunal decision providing further guarantees for temporarily partially disabled workers.

THE IMPACT OF DECISION NO. 2 ON BOARD POLICY

In my submission, *Decision No. 2* is not a fundamental break with Board policy at all. Its most important contribution will be to clarify Board thinking on s. 40(2)(b). The decision should encourage the Board to more closely analyze its cases, seeing s. 40(2)(b)(i) as the primary provision, and asking itself whether the worker's statements or actions truly evidence non-co-operation with medical or vocational rehabilitation. The former focus on s. 40(2)(b)(ii) led to the mechanical approach which has caused so many problems.

Although the Tribunal had no need to rule on the Board's policy concerning s. 40(3), its comments were basically supportive of the policy. The Tribunal evidenced significant respect for the Board's approach of cutting benefits routinely to 50 per cent, and not trying to ascertain week by week a precise percentage figure for the worker's partial disability.

Concerns

In the first part of the decision, the Panel adopted the "issue-setting" approach put forward in the *Pension Assessment Appeals Leading Case Interim Report* (March 1986). These broad powers allow the Tribunal essentially to set its own agenda, raising issues not present in the board decision under appeal. In *Decision No. 2*, the Tribunal's approach did not affect the worker negatively. In another case, it could.

Related to the broad issue-setting powers that the Tribunal believes it has, is the question of whether, on the worker's appeal, the Tribunal can take away all or part of what the worker has already been granted by the Board. At page 8, there seems to be the assumption that the Panel could *reduce* the 50 per cent benefits which had already been granted to the worker. This is similar to the idea expressed in the *Pensions Assessment Appeals Leading Case* that the Tribunal, in a worker's pension appeal, could *reduce* the percentage of disability already granted. The worker side in the *Pensions Assessment Appeals Leading Case* took strong exception to this approach by the Tribunal. Historically, workers (and employers) have worked in a system where an appeal did not bring into risk benefits already granted, unless there was a clear cross-appeal by the other party for a reduction. The knowledge that existing benefits might be put at risk — in even a small proportion of cases — will have a chilling impact on appeals, due to the economic vulnerability of most injured workers. I would argue that employers have just as much to lose as workers, if the Tribunal maintains its position on this matter. For example, an employer which has won 50 per cent Second Injury and Enchancement Fund relief but wants 75 per cent, might on its own appeal, find the Tribunal reducing the relief to 25 per cent or lower! In my submission, the limited benefits (possibly discouraging frivolous appeals?) that the Tribunal may gain from this position are far outweighed by the negative implications. I would urge that, where there is no cross-appeal on the matter under consideration, the Tribunal limit itself to allowing, or denying, the appeal.

On balance, *Decision No. 2* is a major contribution to clarifying the approach to s. 40(2)(b) and s. 40(3).

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The Tribunal's Interventionist and Investigative Powers

Michael J. Cormier*

The new Workers' Compensation Appeals Tribunal has had to deal with a number of questions about the extent and kind of powers it has. One of these issues is the degree to which its powers include investigation prior to a hearing and intervention in a hearing. This paper will examine the Tribunal's views of its powers and the degree to which these accord with the legislation.

It is clear from the Technical Appendix to *Decision No. 24*, dated March 27, 1986, that the Tribunal considers itself to have investigative powers to intervene in the appeal procedure (pp. 2-3). Further, it is evident that the Tribunal considers these to be special powers which set it apart from courts and which ought to be taken into consideration when determining procedures.

The beginning point in this analysis must be the fact that the Tribunal has been given some of the same powers as the Workers' Compensation Board. According to section 81 of the Act they have broad powers to enter the workplace and examine conditions. As well, they have been given the right to establish a roster of medical experts to help in the evaluation of medical evidence. (s. 86h)

A distinction must be drawn between non-medical investigations and further medical enquiries. A Tribunal dealing with physical disabilities will inevitably need to gather medical reports in order to make its decision. However, this form of fact gathering is quite different from investigating the evidence relating to an accident. The medical reports are needed to determine changes in the medical condition or to ascertain its stability. Therefore, one can easily justify the medical investigation but the non-medical stands in a different position.

Also a distinction must be drawn between investigation and intervention. Intervention is not objectionable if it involves setting the hearing agenda and researching the issues. Whether the Tribunal has or ought to have the power to carry out non-medical investigation or to intervene in the parties' handling of a hearing is a question which needs to be considered.

The problem with the argument that the legislation gives the Tribunal broad powers of investigation is twofold. First there is no reason to believe that the Legislature meant to give the Tribunal powers to carry out investigations outside of the workplace or that such a power should be given to them. As long as the parties have an ability to obtain the evidence there is no reason to extend the fact gathering powers of the Tribunal.

Secondly, one has to wonder how many cases will centre on questions which can be answered by further investigation of the work environment (except for cases of industrial disease which are dealt with in separate part of the Act). This is particularly true where the case comes to the Tribunal several years after the event, which is likely to be the norm.

As well as the legislative powers, other arguments used to support the investigative functions are the need to protect the "public funds", and to decide on the "real merits and justice" of the case. However, neither necessarily leads to the granting of powers of investigation or intervention in the hearing process. Two further arguments presented at pages 3 and 4 of *Decision No. 24* are that:

1. The medical roster shows clearly the investigative role of the Tribunal; and,
2. The fact that many parties are unopposed leads to a need for greater investigation and intervention powers.

The Tribunal has argued that its power to establish a medical roster is unusual and indicates that it has a role different from other adjudicative bodies. (p. 1) However, this is not a unique power and is certainly not limited to purely administrative bodies. Courts have long had the power to appoint experts to help them in areas requiring a specialized knowledge as evidenced by Rule 50.03 of the *Ontario Supreme and District Court Practice, 1987.* It is difficult to argue that a limited power to call an expert to help a Tribunal with complex facts can give that body a more general power to investigate.

As well, the position of the Tribunal within the structure of the compensation system suggests that there is little reason to give it an investigative role beyond that of gathering medical evidence. Once a case reaches the appeals level, the WCB has already decided that further investigation is unnecessary. (s. 86g(2)) It is now up to the appellant to show that there is evidence which proves that the Board's decision is wrong. Surely it is also up to the appellant to provide that evidence.

Historically, most appeals brought before the WCB involved issues having to do with medical evidence and its interpretation which further supports the idea of limiting any investigation to medical questions. It must also be appreciated that by the time the appeal occurs there is little left to investigate. The event has long since passed and the facts have been looked into at length. Also the fact that the Tribunal seems to limit its non-medical investigation to reading the WCB file is proof that it is of the same opinion.

Decision No. 37, dated June 23, 1986 seems to provide further support for this proposition. In that case the

Tribunal faced a situation where an appellant had failed to provide the necessary evidence, yet they still chose to leave the evidence gathering to the appellant. While there is some indication that the Tribunal did not find the worker to be credible, this does not alter the fact that they decided to leave the worker with the problem of challenging this finding and providing the supporting evidence. This case points to a further difficulty. If the Tribunal becomes a main investigator of facts and chooses not to investigate all cases, there is a possibility that they will be accused of bias by only investigating some.

A more difficult issue is the procedure of unopposed appeals and the Tribunal's interventionist role. It is true that the Tribunal cannot simply grant appeals on the basis that no one decided to oppose the application, especially when the reasons for the lack of opposition may have nothing to do with the merits of the case. The intervention in these cases consists of the defining of issues by the Case Direction Panel and participation in the hearing by Tribunal Counsel Office, which in turn raises the concern of bias.

A major reason for creating the Appeals Tribunal was to get around the bias created by an in-house appeal system which workers felt was unfair. It seems likely that this perception will recur if Tribunal counsel continue to play dual roles of helping Case Direction Panels and acting as separate participants in hearings.

The Chairman has stated in the *Worker's Compensation Appeals Tribunal First Report 1985-86* that there are safeguards against bias, such as not having Tribunal counsel speak to the Hearing Panels. However, there are several reasons why this is an inadequate answer. It does not deal with the problem of workers' and other parties' perceptions of the situation. What they see is a Tribunal which has lawyers in its offices who intervene in cases to ask questions and make arguments, and they do not know the degree of contact between the Panel and counsel. Why should an outside party be any more convinced by the Tribunal's assurances of objectivity than they were by the Board's? No one would accept the idea that members of a law firm can realistically take opposite sides on a case?

One possible answer to this problem may be to have the WCB appear in defence of its own decisions. But even if the Board does not defend its position, an informed Hearing Panel should still be able to ensure that all cases are fully argued before a decision is made, without Tribunal counsel acting as the ostensible opponent.

It is not unusual to have parties appear before a court unopposed, or to have a case poorly opposed, and yet the courts are usually able to deliver a fair judgement. They do this by carefully scrutinizing the facts and questioning the issues. Presumably this can be done at WCAT by having Tribunal counsel act as assistants to the Hearing Panel, and researching the facts and law. Then the Panel would be able to question the party about all aspects of the case so as to ascertain the merits of the appeal. This would clarify the role of Tribunal counsel as advisors, and would provide the safeguard that was the Board's major concern.

One other possible reason for having counsel involved in the issue-setting role is the fact that unrepresented parties may have difficulty flushing out the issues so that the most relevant and important ones are dealt with. There would seem to be no substantial reasons for objecting to this role. However, it should be left to the parties to deal with whatever issues they consider to be central, and the Hearing Panel should be left with the responsibility of canvassing the issues during the hearing.

It has been shown that there is little reason for the Tribunal to do non-medical investigation, and that intervention in the hearing process should be limited to determining issues and ensuring that the Hearing Panel is fully apprised of all the legal and factual issues. Any other intervention and investigation would create problems without adding to the ability of WCAT to make better decisions.

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Farming and Workers' Compensation Coverage in Ontario

Roger Rickwood, LL.B., Ph.D.*

FROM INCOME REPLACEMENT BY TORTS TO WORKERS' COMPENSATION

The Ontario Task Force on Health and Safety in Agriculture (OTFHSA) has documented in its 1985 *Report* that farm work is one of this province's more hazardous occupations. However, farmers have traditionally resisted coverage under workers' compensation laws (See C. Reasons et al. in *Assault on the Worker* (Butterworths, 1983) at p. 179.) The *Workmen's Compensation Act*, S.O. 1914, c. 25 was Canada's first piece of social insurance providing compulsory income protection against the risks of work-related sickness, disability or death in an industrial society. (See D. Guest, *The Emergence of Social Security in Canada* (2nd ed. UBC Press, 1985) at pp. 39-47.) This scheme involved the payment of benefits in cash and, later, medical and rehabilitative services as a right and not as an act of charity.

EXEMPTION OF AGRICULTURE FROM WORKERS' COMPENSATION

The Ontario *Workmen's Compensation Act* of 1914 was not comprehensive as farm workers and domestic servants were excluded from coverage by s. 109. In contrast, British workers' compensation legislation covered farming, and Imperial Germany had a special agricultural accidents insurance law. Chief Justice Meredith noted in his 1913 *Final Report*, upon which the Ontario Government based the *Workmen's Compensation Act* of 1914, that there was no logical reason why all should not be included, but nevertheless doubted whether public opinion would accept a more comprehensive scheme (p. 21). By public opinion he meant farming interests in the Legislature who threatened to block any compensation statute that included farm workers. Other provinces soon introduced workmen's compensation laws, but they also excluded farm workers.

COMMENCEMENT OF EXTENSION OF COVERAGE TO FARMING AND FARM SAFETY EDUCATION

In Ontario, in the late 1950s, there was evidence that farm mechanization was accompanied by "too high a price being paid in human life and injury". (OTFHSA Report, p. 28) In response the Agriculture Department established a farm safety unit and an Agricultural Safety Council in 1960 to work with county safety councils to promote farm safety among farm people. The Legislature responded in 1965 by amending the *Workmen's Compensation Act*, S.O. 1965, c. 142, s. 8, to remove the farming exemption. According to the Workers' Compensation Board's *Annual Report* in 1965 the WCB passed an enabling regulation to make compensation coverage compulsory for hired farm workers in 1966. Ontario thus became the first province in Canada to inaugurate compulsory coverage for farm workers. Compulsory coverage allowed the WCB to begin to financially assist the Ontario Farm Safety Council in 1968. In 1970 the Council was transferred from the Ministry of Agriculture to the Board, and in 1973, it was replaced by the Farm Safety Association (FSA). Most county safety councils continued with FSA programs and financial assistance.

The FSA is supported by WCB funds collected from farmers who pay compensation assessments for hired help or themselves. Its program is planned by the FSA's board of directors, which is made up of farmers. Activities include provision of hazard information, consultation on OHS problems, audits of farm conditions, and training and awareness activities in schools and at conferences. To implement this program, there are executives at Guelph and consultants across Ontario who interact daily with farmers and farm organizations.

FARMING AND THE PRESENT ONTARIO WORKERS' COMPENSATION SYSTEM

The Statutory Framework and Its Application to Farming

Generally the present *Workers' Compensation Act* requires mandatory coverage for all paid agricultural workers, either seasonal or working year round. This includes a family member or relative, including a spouse, who works on the farm and receives a wage regardless of whether that appears on the farmer's wage record. Furthermore, children receiving wages, as opposed to an allowance, for their work require compensation coverage, regardless of their age. (See Workers' Compensation Board, *Workers' Compensation and the Farmer* (1985).)

The only exceptions to the mandatory coverage are those working for farm operations not enumerated in Schedule 1 of Regulation 951 under the Act. A farm is defined in s. 1(a) of Regulation 951, and specific farm operations are set out in Class 27 of the Schedule, except for sod farms which are covered under section 1(xviii) of Class 24. Farms that are not specified in any class are not covered. Certain exotic farms (e.g. ginseng, chinese vegetables) may not be covered. However, the language of Class 27 is quite broad and such farms may be squeezed into a "general farm" or "cash crop that is mechanically harvested". Certain custom operations are not set out in Class 27 such as

clover mills, ensilage cutters, balers, threshers and drainage contractors. The WCB has found that these operations are covered regardless of whether or not they are based on farm premises. Other operations, such as pesticide application or manure spreading appear not to be covered. These custom operators may be covered if the operation is ancillary to a listed farming operation. If not, the employer may apply under s. 95 of the Act to be covered under Schedule I.

The WCB Claims Services Manual, s. 1(1)(z), Directive 12, para. (D)1(b), at p. 33 deals with casual workers employed by a custom contractor. This section of the directive provides:

> A group with a person or leader who pays the workers and makes a profit on the wages of the group is not considered to be a worker of the farmer. The leader is a contractor and the workers are workers of the contractor, assuming the operation is under the Act. Discretion will be used in considering the application of Section 11.

Therefore, if the contractor is not under the Act, the workers are not covered. The reference to Section 11 of the Act may indicate that contractors, along with their workers, may be considered as employees of the contracting farmer in some circumstances.

People operating their own farms do not have to have workers' compensation coverage, although it is available on request under s. 95. Some 3,400 Ontario farmers have subscribed for personal coverage. Contractors, such as custom operators who use their own machinery or equipment, are responsible for paying their own assessments. They are not considered by the WCB to be employees of the farmer, but proprietors of their own businesses.

Because farmers and their workers often help each other, provision is made for coverage in exchange of labour situations. The WCB's administrative policy, which allows labour sharing between farmers is set out in the WCB Claims Services Manual, s. 1(1)(z), Directive 12, p. 31. Generally, the hired help of one farmer who assist on a neighbouring farm have compensation coverage as long as they are on the original farmer's payroll, or are being paid for the work done by the neighbour and are included on the neighbour's payroll statement. Compensation coverage also carries over to the farmer who has personal compensation and who helps out on another farm, as well as to the farmer who does not have personal coverage but who is paid for work done by a neighbour and is included on the neighbour's payroll statement.

Ontario Coverage in Comparison to Other Jurisdictions

Ontario has been quite liberal in terms of agricultural coverage. Compulsory coverage is granted to farm workers in six jurisdictions in Canada (Ont., B.C., P.Q., Nfld., Yukon and N.W.T.), while New Brunswick requires compulsory coverage for farm workers in operations employing three or more workers. Voluntary coverage is available in the five other provinces. There has been some change in recent years, as in 1974, only four Canadian jurisdictions required compulsory coverage. A Saskatchewan legislative advisory body has recommended compulsory coverage for farm workers. (see *Report of the Workers' Compensation Act Review Committee* (Saskatchewan 1986), p. 63.)

In the United States, farm workers are often exempted from compensation coverage, primarily on the ground that administration of such coverage would be too complex. Sixteen states now provide the same coverage for farm workers as for other workers and 22 give limited coverage. Further information can be found in A. Larson, *The Law of Workmen's Compensation* (Mathew Bender, 1985) commencing at paragraph 53.00 and in Appendix A-4-1.

In Ontario there are still a number of grey areas, in respect to coverage of farm operations as well as contract workers. At present the Workers' Compensation Appeals Tribunal is clarifying some areas. One panel has had to consider whether worm picking is included as a Schedule 1 industry. (see *Interim Decision No. 417,* dated August 29, 1986, and *Final Decision No. 417,* dated December 17, 1986.) Another panel may have to deal with the question of who is the employer of chicken catchers who have been supplied by an outside contractor to the farmer on whose farm they are working. There have been few farm-related coverage appeals to the Tribunal. The reason for this is unknown, but many farmers and farm workers may not even know that the Tribunal exists. The Tribunal's outreach program was until the end of 1986 focused on industrial and urban areas. Farmers and farm workers may also be more willing than industrial workers and employers to accept WCB decisions rather than to appeal them. A joint effort by the FSA, WCB and WCAT may be needed to increase the Tribunal's profile in rural areas.

Benefits Provided and Types of Compensable Claims in Farming

Benefits for farm workers are no different to those for workers in other industries covered by the Act. The farmer is required to report the accident or illness to the WCB. Some difficulties arise in accident reporting as farmers often feel they are too busy to report the incidents, or do so later when their memory of the facts has somewhat faded. A further problem exists in that farm workers may not even report an accident to the farmer because of fear of losing their jobs. Assuming a proper report is filed, the Board compensates for temporary loss of earnings as well as for health care expenses. If the effects of a job-related injury or disease are permanent, the WCB will pay a pension. For

farmers and hired help who cannot return to farming, various forms of vocational assistance are provided, including counselling and retraining for other employment. This may be a difficult process for farm people because of geographical isolation from alternative employment, and lack of applicable skills to the urbanized marketplace.

The WCB's 1985 *Annual Report* shows that 2,316 temporary total compensation or lost time claims arising from farm work were settled in 1985. This is based on reported accidents, and indications are that the actual number of farm accidents is much higher. This figure of 2,316 represented 1.3 per cent of all temporary total compensation claims settled in Ontario in 1985. This percentage is down slightly from 1984 when agricultural claims made up 1.5 per cent of all Ontario temporary total compensation settled claims (2,351 out of a total of 135,895).

With respect to fatal settled claims by industry, the 1985 *Annual Report* recorded nine claims for farming in 1984, and five in 1985. These figures were 4.5 per cent of the 1984 total claims figure, and 3.5 per cent of the 1985 total claims figure. These fatal claims would seem to under-represent the actual fatality figures in agriculture, according to the FSA fatality reports. In 1984, the FSA recorded some 48 deaths on farms and in 1985, there were 27 deaths. (see FSA, *Annual Report*, 1984, p. 12 and *Annual Report*, 1985, p. 12.)

Farm workers process their claims directly through the WCB, and WCB staff do not treat farm claims differently from other entitlement claims. There does, however, seem to be some reluctance in farm workers filing claims even where there have been serious complaints of hazards, e.g. direct pesticide spraying, or unsanitary conditions, which could result in injuries or illnesses. Farm workers appear to be more likely to turn to public health and environment officials before filing a WCB claim. These concerns were expressed in a brief presented by Ontario Farm Labour Information Committee at a OTFSA hearing in London in November 1984. There also appear to be few entitlement appeals from farm workers being processed through the internal WCB review system. No entitlement claims appeals involving farmers or farm workers have as yet reached the Appeals Tribunal, although the Office of the Worker Adviser and legal clinics have been involved in a few claim applications.

Paying for Workers' Compensation in Farming

Farmers pay an annual assessment to the WCB depending on their total payroll and type of farming. Farms are classified by the Board into various rate groups according to their kind, and the risks associated with them. There are at present three rate groups. Each rate group then has an assessment amount assigned to it by the WCB which reflects primarily the costs of injuries and occupational illnesses expected to occur within that rate group during the year (see WCB, *Workers' Compensation and the Farmer* (1985).)

To register a farm operation for compensation, a farmer should provide a payroll estimate and a description of the kind of farming carried out to the WCB's Assessment Services Office in Toronto. A farmer can ask the WCB to review its assessment of his operation, and if dissatisfied can appeal the matter to WCAT. There have as yet been no appeals of agricultural assessments to WCAT. However, even industrial employers have, to date, made little use of this procedure.

Procedures Followed When Agricultural Workers Submit Claims

Normal WCB claim procedures are followed for claims by farmers and farm workers. Although these claims were once submitted only through the WCB Head Office in Toronto, they may now also be processed through regional WCB offices. Farm safety officials say this administrative change has eased previous filing difficulties encountered by farmers and farm workers who were not comfortable dealing with the WCB Head Office.

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The Benefit of the Doubt Principle: A Review of Some Recent WCAT Decisions

Michael S. Green*

It is a well-known principle of our workers' compensation law that "where it is not practicable to determine an issue because the evidence for or against the issue is approximately equal in weight, the issue shall be resolved in favour of the claimant". This principle was embodied in WCB policy for many years and codified recently in the above wording in s. 3(4) of the *Workers' Compensation Act*. One issue to which the principle applies is whether an injury arose out of and in the course of employment — the causation issue. This issue is one of the most troublesome, if not *the* most troublesome, that a workers' compensation adjudicative body such as the Appeals Tribunal faces. This is because the evidence about the significance of any pre-existing conditions, such as degenerative disc disease, may be inconclusive. In such cases, it is very helpful to know whether the Tribunal considered that the benefit of the doubt principle applied, and if not, why not. Two decisions of the WCAT, *Decision No. 32* dated June 3, 1986, and *Decision No. 6* dated June 5, 1986, illustrate my point. In *Decision No. 32,* the benefit of the doubt principle was applied. In *Decision No. 6,* the principle was not referred to in circumstances where one would have expected that it might have had application.

DECISION NO. 32

Facts

The worker first suffered a minor lower back injury at work in 1966. Ten years later he strained his lower back at work and was off for eleven days. Between 1976 and 1981, he suffered intermittent back pain of steadily increasing severity and sought medical treatment in 1981. The pain progressed to the point where he was unable to work for six months in 1984, and was diagnosed as having degenerative disc disease. The issue for the Appeals Tribunal to decide was whether the 1976 accident had aggravated the worker's degenerative disc disease — that is, whether it accelerated the progress of the disease.

Evidence and Findings on the Causation Issue

The medical evidence on the causation issue was inconclusive. The Tribunal found that "doctors can only speculate as to the causal relationship . . . because the medical science's understanding generally as to what causes disc disease to become symptomatic and progress is itself very limited" (p. 3). The Tribunal found that it had to rely heavily on evidence about the progression of the worker's symptoms. This evidence was, in the view of the Tribunal, inconclusive during the period from 1976 to 1981. As a result, the Tribunal found that the pain experience of the worker during this time was equally consistent with two conclusions:

1. gradually emerging pain caused by underlying degenerative disc disease; and
2. pain accelerated by the 1976 accident.

The Tribunal decided that the benefit of the doubt principle compelled the acceptance of the second conclusion and, as a result, the 1984 layoff was compensable.

In my view, the Tribunal applied the benefit of the doubt principle correctly in this difficult case. The Tribunal does not state, but certainly must have been aware, that it is difficult for a worker to recollect the frequency of his pain symptoms in a period ten years prior to the hearing. Where medical attention has not been sought, there will likely be no record of his complaints of pain. This is exactly the type of case where the benefit of the doubt principle should apply.

DECISION NO. 6

Facts

The worker was reaching into a box at work when she felt a pain in her shoulder. She reported the incident to her supervisor on the same day according to her evidence, and sought medical attention six days later, but continued working at her regular job for a month until the plant closed down. At this point, her shoulder pain became disabling. The worker gave somewhat inconsistent versions about whether the onset of pain was associated with a specific incident. The Tribunal found that there was, in fact, no such specific incident but that the onset of pain constituted a disablement. The issue became whether the disablement arose out of the worker's employment.

Evidence and Findings on the Causation Issue

The key issue for the Tribunal was the diagnosis of the worker's injuries and the evidence on this issue was by no means clear. Three diagnoses suggested in the medical reports were torn rotator cuff, cervical degenerative disc disease, and a soft tissue injury. The Tribunal ruled out a torn rotator cuff as the correct diagnosis because in its view, the worker's activity, lifting rods weighing five to ten pounds, could not have caused this injury. The Tribunal found that the probable cause of the shoulder pain was cervical degenerative disc disease but gave no reasons for preferring this diagnosis to that of soft tissue injury to the shoulder. X-rays did show that the worker had degenerative changes in her cervical spine. It is, however, well-known that many workers with horrible

degeneration on X-rays will be pain-free. It is dangerous to rely on an X-ray report in this context. It is also interesting that there is no mention of neck pain in the Decision.

It is plain from reading the decision that the Panel was not confident about its acceptance of the diagnosis of cervical degenerative disc disease. In reaching its decision, the Panel used language which suggested that there was an onus on the worker to establish causation:

> To be entitled to benefits under the *Workers' Compensation Act*, a worker *must establish*, on a balance of probabilities, that there was a personal injury by accident arising out of and in the course of employment. (p. 2, emphasis added).

Further, the Tribunal concluded on page 5:

> In the absence of evidence which *establishes* on a balance of probabilities that the work activity caused the disablement, and in the presence of medical evidence which would seem to point to a non-work related degenerative cervical condition as the probable cause of the worker's onset of pain, we conclude that the worker's left shoulder disablement did not arise out of and in the course of her employment. (emphasis added).

Under the *Workers' Compensation Act*, there is no onus on the worker to establish anything. The WCB or the WCAT must weigh whatever evidence is before it. If the evidence suggests one conclusion more strongly than any other, then that conclusion should be accepted. If the evidence supports several conclusions equally strongly, then the conclusion most favourable to the worker should be chosen. Where the evidence on an issue is incomplete, the WCB and WCAT (to a lesser degree) can attempt to obtain further evidence using the broad investigatory powers they have. In this way, the lack of onus does not impede either the WCB or the WCAT from adjudicating disputes in a fair and satisfactory manner.

The Tribunal did not refer to the benefit of the doubt principle in its Decision. In the context of a difficult case, this is unfortunate. In fairness to the Panel, there were many suspicious circumstances in this case, perhaps the most troubling being that the pain only became disabling after the plant closed down. The significance of these circumstances are to a large degree not explained in the Decision.

CONCLUSION

It is important that the benefit of the doubt principle be consistently applied by the Tribunal so that workers do not believe there to be an evidentiary onus on themselves. It is, therefore, useful for the principle to be referred to and considered in cases where there is significant doubt about the correct conclusion to be drawn from the evidence.

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A New Direction For Tribunal Counsel

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The function and role of the Tribunal Counsel Office as first established and developed at the Workers' Compensation Appeals Tribunal is significantly different than the traditional one played by counsel with other administrative tribunals. An examination of these more traditional roles is therefore instructive in any assessment of the Tribunal counsel.

Involvement of lawyers in an administrative hearing or before an administrative tribunal is founded on statute and the common law. With respect to statutory foundation, the role of lawyers may be addressed by the specific act which empowers the administrative body, while some are delineated by the *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484. Section 10 of this statute provides that "a party to proceedings may at a hearing be represented by counsel or an agent", while section 11 allows some opportunity for witnesses at a hearing to be advised by counsel or an agent.

At the Federal level, the *Constitution Act, 1982*, seems to offer little assistance on this issue. However, given the "new lease on life" for the *Canadian Bill of Rights*, R.S.C. 1970, Appendix III, by the Supreme Court of Canada, it may be noteworthy that section 2(d) provides that no Canadian law shall be construed to "authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel . . ." and may therefore provide a safeguard for witnesses. Furthermore, section 2(e), referring to the principles of fundamental justice, may be interpreted as providing a party with a right to legal representation at an administrative hearing.

Commentators on the subject consistently point out that there is no absolute right at common law to have legal representation before statutory decision-makers. However, the refusal has been held in some cases to be contrary to the principles of natural justice. Consider, for example, *Bachinsky and Cantelon* v. *Sawyer*, [1974] 1 W.W.R. 295 (Alta. S.C.), a case where two police officers were alleged to have used excessive force in dealing with a suspect. The disciplinary code pertaining to this particular police department contained the following statement:

> An accused . . . has the right . . . [to representation by] an agent . . . [at internal police force hearings] . . . and by counsel or agent in proceedings before the Law Enforcement Appeal Board (p. 299).

This meant that the accused officers were only entitled to an agent, e.g. a fellow officer, to represent them at an internal hearing, and representation by legal counsel would be available to them only later at the Appeal Board level.

The Alberta Supreme Court though ruled that natural justice demanded the accused officers be permitted to have representation by legal counsel at the internal hearing level for two reasons. First, the matter was of such gravity that the "reputations and livelihoods" of the officers were at issue (p. 300). Secondly, although the matter could be appealed to the Appeal Board, there would be a record created by the internal hearing which may have an effect at a later hearing (p. 303-4).

Traditionally, lawyers have occupied a role as either counsel to one or more parties, or as an adjudicator, or member of an adjudicative panel. Ethical considerations, such as conflicts of interest, tend to preclude a lawyer from acting in both roles in a particular matter. It should be noted also that there may be occasions where a lawyer may participate in an administrative hearing as a complainant or witness.

With respect to the lawyer's role as counsel, the lawyer may represent the interests of a party directly affected by the proceedings such as a third party intervenor or a witness. A further role, part of an apparent trend in administrative tribunals, is to have legal counsel represent the interests of the tribunal itself or the tribunal board. According to the *Professional Conduct Handbook* (L.S.U.C., 1983), Rule 2, the lawyer in this mode, regardless of which of the above noted "clients" he or she may represent, has a professional obligation to provide competent, conscientious, diligent and efficient service to the party represented. On another level the advocate is "to ensure that the concept of fairness of administrative tribunals is present in form and actuality" (C. Yates "The Lawyer in the Regulatory Process' (1980), 18 *Alta. L. Rev.* 70 at 86).

It would be useful to compare the role of the lawyer as counsel before an administrative tribunal with that of a counsellor role of a lawyer appearing before an inquiry and a court. With respect to inquiries, consider, for example, boards of inquiry that operate under the Ontario Human Rights Commission. These boards feature a counsel whom, in most cases, represents the interests of both the Commission *and* the complainant — a dual role which according to J. Laskin in "Proceedings Under the Ontario Human Rights Code" (1980), 2 *Advocates' Q.* 280 at 302, is "an uneasy one". On one hand, the counsel represents the adversarial position of the complainant while, on the other, the counsel represents the public concerns. Such an opportunity for dual representation is not accorded to a lawyer appearing in court. Indeed, a lawyer would be ill-advised to undertake responsibility for presenting *all* witnesses rather than

only those who support him or her case or ensuring that all relevant issues are raised. In fact, strategically, it may be in the best interests of a case to have the decision turn on only some minor issues or points raised.

The lawyer as counsel to both boards of inquiry and to administrative tribunals may share some common functions, such as those of an investigatory, recommendatory and/or counselling nature, depending upon the mandate of the particular body. Counsel in court, in comparison, may undertake some investigation, but any findings must be advanced through the testimony and/or the provision of physical evidence. Recommendations and counselling are performed with respect to the lawyer's client and the client's case and less with respect to the matter of proceeding. This is particularly true with respect to the inquiry model since, as R. Anthony and A. Lucas point out in *A Handbook on the Conduct of Public Inquiries in Canada* (Butterworths, 1985), "most inquiries have no established practice . . ." (p. 133).

Where a lawyer acts as counsel to an inquiry there may well be more of an open-ended responsibility than one would expect from counsel in court or in most administrative settings. This variable in how counsel might function is illustrated by the following commentary on evidence from the recent work by Anthony and Lucas on the conduct of inquiries:

> The inquiry must . . . determine the role of the inquiry counsel in presenting evidence. In some cases, for efficiency of effort, control over the proceedings, or because none of the participants is capable of assembling the evidence, inquiry counsel may be assigned the principal task of presenting witnesses. In such circumstances inquiry counsel will act very much like any other counsel except that he should regard his "client" to be the inquiry, not the commissioner. It would be a disservice to the inquiry if the commissioner alone decided what he was to hear.
>
> On the other hand, the commissioner may wish the participants themselves to carry the major responsibility for calling evidence. In that case, it may be in order for inquiry counsel to advise the participants of some of the issues that, in his opinion, should be addressed in evidence and confirm that this evidence will be called by one or more of the participants. This would be the exercise of inquiry counsel's responsibility for ensuring that evidence is called on all issues relevant to the inquiry while, at the same time, ensuring that those participants with the greater interest in particular evidence call that evidence. (p. 78)

If one were to make a general comparison between the roles of counsel in a court setting, an administrative forum, and an inquiry, one could say that in court the potential roles for counsel are the most refined and the most limited. For an administrative tribunal, counsel may represent the tribunal or involved parties but, generally there is separate counsel for each. It is submitted that the Tribunal counsel bridges the gap between the roles of counsel at an administrative hearing and an inquiry.

When a request is made to WCAT to have a matter reviewed, the initial role of the Tribunal counsel is to prepare a description of the case which involves a general review of the case. It is the Tribunal counsel's case description which then becomes an integral part of the hearing.

If Tribunal counsel appear at the hearing they may take an active role by asking questions after a particular participant has finished his or her questioning of a witness. This includes both direct examination of witnesses and cross-examination. At the close of a hearing, they may or may not make submissions to the Tribunal *on behalf* of any or all participants or *independent* of any or all participants.

WCAT's rationale for the expansive role of Tribunal counsel is that there is a public interest at issue each time there is a claim being made against the Workers' Compensation Board. There are arguably at least three other reasons that support this role as a positive development. The first might be headed "Access to Justice" as outlined by H. Janisch in "Administrative Tribunals in the 80's: Right of Access by Groups and Individuals" (1981), 1 *Windsor Yearb. Access Justice* 303. Tribunal counsel has an important mandate to serve in being able to introduce concerns of a larger scope than those of the immediately affected parties to the hearing since in order ". . . to be effective, the regulatory process requires the active participation of parties other than the applicant . . ." (page 309) The second reason is that it provides a better opportunity for participants at a hearing to have legal representation. Although it is possible for indigent persons to obtain legal aid for assistance with a WCAT hearing, in reality the individual may be unaware of the availability of this assistance, or simply may choose not to apply for it.

Better quality presentations is the third reason the Tribunal counsel can serve a purpose. It may well be that a highly competent lay person may choose to appear and the Tribunal counsel can provide guidance to these individuals on procedural and substantive matters.

When assessing the above role of Tribunal counsel one concern that is raised is the "appearance" of an institutional bias to an objective observer, wherein on one side of the hearing room is the WCAT Panel, while on the other side is the WCAT counsel. Can it be clear in the mind of every participant that the Panel and the counsel are serving different functions despite the fact that they are from the same governmental agency? The critical view would maintain that there is too close a connection between the advocate and the adjudicator

here, whether real or perceived, to avoid the inference of institutional bias.

A second concern arises out of *Decision No. 4*, dated January 14, 1986, where the worker's representative complained that some of the questions posed by the Tribunal counsel had created an environment that was too adversarial and intimidating for worker appeals. In response the Panel made it clear that it supported the actions of the Tribunal counsel. Thus by allowing the hearing to become more adversarial than at least one party desired, it could be argued that the purpose of the Tribunal counsel is to somehow "even up the sides" of the competing interests, regardless of how the parties may choose to conduct their respective approaches. It is submitted that this approach is an unwarranted deviation from the *audi alteram partem* principle. A. Roman in "Legal Constraints on Regulatory Tribunals: Vires, Natural Justice and Fairness" (1983), 9 *Queen's L.J.* 35 at 57-8, argues that an administrative tribunal should not be able to "compel non-lawyers to use Commission counsel or the Chairman to ask questions on their behalf, as it is improper to impose counsel on an unwilling client . . ." Yet, while WCAT does not so compel, it accomplishes the same feat — and more — through the auspices of the Tribunal counsel.

A third concern is what drives the WCAT hearing process. Again in *Decision No. 4*, 1986, the Panel states that it did not "accept the proposition on [sic] that it must make decisions solely on the basis of what the parties to an appeal may choose to present." This could suggest that the WCAT process is a kind of a perpetual bureaucracy system that will not permit outsiders to impede. One might prefer to believe that WCAT is a legitimate process and not a charade for implementing governmental policy, but it is troublesome to find evidence that tends not to support this premise.

The creation of the Tribunal Counsel Office has been the development of a new idea and a new concept. Given the role and duties performed by them, it is submitted that it operates in the inquiry counsel model which takes it in a new direction. It accomplishes what many administrative bodies strive for, namely, access to justice. An individual can approach a WCAT hearing with the knowledge that the Tribunal counsel is available to provide some legal assistance. The question now is whether or not the Tribunal counsel, with its expansive role, is achieving what it was set up to do? While a better definition of their role, and responsibilities, or other reforms may well be in order, the new direction for Tribunal counsel is a valuable innovation, which requires careful monitoring to ensure its best utility.

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Normal Work and Abnormal Consequences

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Decision No. 19 of the Workers' Compensation Appeals Tribunal dated February 18, 1986, reaffirms Directive 2 of the Workers' Compensation Board's Policies and Divisional Administrative Guidelines that a specific incident at work need not have occurred in order for a disablement to fall within the definition of "accident" contained in s. 1(1)(a)(iii) of the *Workers' Compensation Act*. WCB Directive 2 under s. 1(1)(a) states: ". . . there must be something about the work which can be considered to have caused the disablement to come on . . ." The WCB has long operated under the principle that a compensable disablement must arise not simply during the course of employment but *out of* the employment. In other words, heart failure is not compensable simply because it occurs during employment, but must bear some relation to the employment itself. The WCB requires that there must be "causality", but has never defined what this term means. This paper seeks to define how close a connection there must be between the work performed and the accident.

In WCAT *Decision No. 32*, dated June 3, 1986, the Tribunal reasons that the work as an "aggravation" constituted a compensable accident: ". . . if shoving the boulder produced some trauma in the back which caused or *aggravated* or accelerated the condition and if this caused the disabling pain in 1984, then compensation should flow . . ." (p. 3, emphasis added.) Work related stress, whether it be physical or mental, is not unusual in the work environment. Yet, does the combination of work activity, the aggravation of a physical or mental condition, and the resulting disablement, constitute an "accident"?

WCAT *Decision No. 111*, dated June 13, 1986, emphasizes the importance of the existence of strenuous work in determining whether to award benefits. The Tribunal stated: "However, neither of these factors [a particular incident or recent change in work process] is essential to establish entitlement in situations where there is a *longstanding strenuous or awkward work process* with continuity of complaint, and supporting medical relationship between the process and the disability" (p. 5, emphasis added.) However, the Appeals Tribunal has not stated that strenuous work *must* be present for an accident to have occurred.

In *Decision No. 70*, dated March 25, 1986, a change in the work process appears to have constituted an accident. The former work assignment was "strenuous" and the following work assigned was "even more strenuous" (p. 5.) The Tribunal considered this situation to have met the criteria in WCB Directive 2 referred to above. The Tribunal wrote, "if an injury occurs over time, and there is something about the employment that causes the injury, the injury is compensable" (p. 4.) In this decision the Tribunal appears to have adopted the "but for" test, which could be summarized as follows: the injury would not have happened but for the fact that the condition or obligations of the employment put the claimant in the position where he was injured. What if in *Decision No. 70* there had been no strenuous work, awkward position, or unaccustomed strain? Using the "but for" test, the employment could be considered an accident causing disablement, without strenuous work.

In our opinion the "but for" test is not at all compatible with WCB Directive 2. In that Directive there must be something unusual about the work such as its strenuousness, awkward position, or unaccustomed strain etc. If the Appeals Tribunal did not intend to adopt the "but for" test, then the following questions are unanswered:

a) is new work which involves new activity "unusual", and thereby consistent with being disabling?
b) if a worker moves to a job involving prolonged sitting or standing, can prolonged standing in that instance constitute "strenuous" work?
c) does the change of duties in and of itself constitute strenuous work, for instance going from sedentary work to work requiring a moderate degree of activity?
d) does there have to be something unusual about the work for an "accident" to have occurred?

In *Decision No. 19* the process in question involved replacing cross arms on hydro poles, called "bumping". The Appeals Tribunal considered this process "stressful" to the worker's shoulders (p. 4.) The Chief of Orthopaedics at Sunnybrook Hospital wrote: "It is my firm opinion that this bilateral rotator cuff problem is a work related injury" (p. 3.) We take this quotation to mean that "bumping" was medically considered to have either caused, or aggravated, or accelerated, the condition of the disability. These authors are concerned that "bumping" was a job requirement for linemen for over 21 years. The issue of whether the work itself was "strenuous" or "unusual" was not dealt with medically, nor did the Tribunal comment as to whether such criteria are legally material. It would appear from the reasons that there was an error on the face of the record in *Decision No. 19*. Quaere whether a non-party to the decision has a right to apply to the Corporate Board of the WCB pursuant to section 86n to have this decision reviewed?

The issue of whether work must be "strenuous" or "unusual" for an accident to have occurred is considered by A. Larson in *Workmen's Compensation*

(Desk Ed.) Rather than making "unusual activity" a precondition of "accident" in an attempt to stop compensating injuries which may not be substantially related to employment, Larson suggests the following test of causation and accident where personal factors (latent and pre-existing conditions) are present: "employment must contribute something substantial to increase the risk," and there must be "an exertion greater than that of nonemployment life" (paragraph 38.83.) This jurisprudence suggested by Larson is consistent with the position of the WCB that the work activity has to clearly be a substantial contributing factor rather than the minimal straw that breaks the camel's back.

In these authors' opinion, Larson's substantial contribution test of causation and accident is best suited to all instances where disability arises without a specific incident occurring at work, regardless of the presence or absence of latent or pre-existing conditions. The test necessitates a medical opinion to confirm the liability with respect to the work process, rather than relying on a layman's intuition as to what constituted unusual work. By using the word "substantial" the definition negates work that is the "straw that breaks the camel's back". It means there must be a nexus between the work and the disability rather than compensation for ordinary wear and tear which produces disability. These are important considerations when dealing with an *employer funded compensation plan.* Since the employer is bearing all costs, then the causal link between a disability and activity at work must be clear, or in other words "substantial". Use of the word "substantial" means that the relation between the work and the disability must be integral rather than peripheral.

In *Decision No. 72,* dated July 17, 1986, the Appeals Tribunal adopted the following test: "has . . . the employment made no significant contribution to the occurrence of the injury" (p. 11.) The "significant contribution" test fits somewhere between the "but for" test and "substantial contribution" test. It is more demanding than the former, but less demanding than the latter. The reasoning of the Appeals Tribunal was based on the judgement of Mr. Justice White in *Re Kuntz and the Workers' Compensation Board* (1985) 51 O.R. (2d) 728 (Div. Ct.), and the Supreme Court of Canada judgement in *Workers' Compensation Board v. Theed* (1940) 3 D.L.R. 561. The problem with both of these judgements, insofar as *Decision No. 72* is concerned, is that the "significant contribution" test is nowhere actually adopted by the courts. The key phrase in Mr. Justice White's judgement is: ". . . there must . . . be *some* reasonable relationship between the chance event and the work or the environment of the workplace. . ." (*Re Kuntz and the Workers' Compensation Board,* p. 740, emphasis added.) We do not see why a reasonable relationship would not equally be considered a "substantial contribution". There is no authority in Mr. Justice White's quotation for "arising out of" to mean something different than "caused by employment".

In *Decision No. 72* prolonged sitting at a sewing machine was held to be a significant cause of disability. This finding seems to be based on no definitive medical basis but on one orthopaedic doctor's view that the back sprain might be work-related and on another's that the worker suffered an "activation". We would like to ask the Tribunal what percentage of the worker's disability was brought on by the prolonged sitting, and what percentage was brought on by the degenerative disc disease in this worker's back. The Appeals Tribunal adopted the "significant contribution" test but applied the "but for" test. In our opinion, for a work condition to be a significant cause it must be responsible for at least half of the disability. There is no medical evidence in *Decision No. 72* that the work activity was responsible for that extent of the disability. From the evidence concerning her symptomatic and severe degenerative disc condition, it is quite clear that more than fifty percent of the worker's disability was in relation to pre-existing factors, particularly when one considers the ongoing nature of the disability. In fact, the Appeals Tribunal should ask the medical profession whether they believe working at a sewing machine is a reasonable cause of any disability, as this is one of the lightest forms of labour for comparatively unskilled workers. To say that work can produce a disability either significantly or otherwise is totally unreasonable. The Appeals Tribunal has sent a message to the work force of this Province that any worker who develops back pain while operating a sewing machine, and who is unlucky enough to have degenerative disc disease, can now claim extensive compensation. This is a totally absurd result, is not based on a shred of medical evidence, and in fact is contrary to *Decision No. 32* where the Tribunal wrote "it is not possible to conclude that manual labour itself causes or accelerates the condition [degenerative disc disease]" (p. 2.)

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Letters to the Editor

What makes a decision "significant"?

I would like to know what makes a decision "significant"? Many of the published decisions would hardly seem to be to be significant, whether in terms of legal, policy or social significance. Also, if a decision is not considered "significant", then why is it listed at all within the Keyword or Numerical Indexes? Why not adopt a publishing system similar to that of the British Columbia WCB? In that scheme, significant decisions are published and numbered when they become available, not according to when the appeal was heard. Thus, insignificant decisions are not even listed or included.

Perhaps the Ontario WCAT is publishing too much and should exclude insignificant decisions from any reference.

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Advisers in Workers' Compensation Matters
Unionville, Ontario

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Roger Rickwood
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